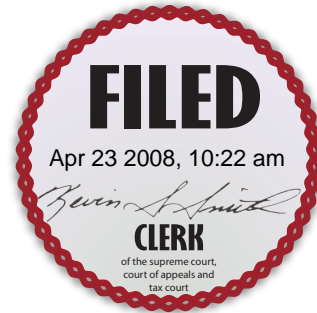


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

WILLIAM TYRONE THOMAS,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 18A02-0710-CR-850

APPEAL FROM THE DELAWARE CIRCUIT COURT
The Honorable John M. Feick, Judge
Cause No. 18C04-0608-FA-14

April 23, 2008

MEMORANDUM DECISION - NOT FOR PUBLICATION

MAY, Judge

William Tyrone Thomas appeals his convictions of maintaining a common nuisance, a Class D felony;¹ dealing in cocaine, a Class A felony;² and two counts of dealing in cocaine as Class B felonies.³ The evidence is sufficient to support Thomas' conviction, and the trial court did not abuse its discretion when it denied Thomas' motion for a continuance. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

In the summer of 2006, the Muncie-Delaware County Drug Task Force was investigating Thomas. Officer Seth Stanley arranged for a confidential informant to purchase drugs from Thomas. On June 7, 2006, Officer Stanley and a female officer searched the informant and did not find any money, controlled substances, or weapons. Officer Stanley gave the informant \$50 of previously photocopied money. He dropped the informant off in the parking lot of the Rooster Tail Bar and then parked where he could see the informant. Officer Stanley, who was familiar with Thomas, saw him pull up to the informant in a green Bonneville. An exchange was made through the window, and Thomas left. The informant returned to Officer Stanley's car and gave him a bag containing an "off white rocklike substance." (Tr. at 91.) Officer Stanley searched the informant again and did not find anything.

¹ Ind. Code § 35-48-4-13(b).

² I.C. § 35-48-4-1(b)(3)(B)(iii).

³ I.C. § 35-49-4-1(a).

Another buy was arranged on June 12, 2006. The informant was searched in the same manner and supplied with \$50 of previously photocopied money. Officer Stanley dropped the informant off at a Dollar General store and parked where he could observe her. Thomas arrived in a green Bonneville. An SUV resembling a vehicle used by the police arrived at the same time, and Thomas immediately drove away.

Officer Stanley took the informant to a pay phone so she could call Thomas. He then dropped her off near Murray's Auto Body Shop on Granville Avenue. He parked about a block away and could not see the informant. Officer Jeff Stanley was parked at Murray's. He saw the informant approach a green Bonneville, open the door, and lean in. The driver leaned toward the informant "as if handing the CI something." (*Id.* at 186.) Officer Jeff Stanley saw the informant begin walking south along Granville Avenue, toward Officer Seth Stanley's car. Thomas left in a different direction. Officer Seth Stanley heard over the radio that the informant was walking toward him, and he picked her up. She gave him a bag of "off white rocklike substance." (*Id.* at 98.) Officer Stanley searched her and found nothing.

A final buy was arranged for August 15, 2006. The informant was searched in the same manner and given \$50 of previously photocopied money. Officer Seth Stanley took her to the intersection of Streeter and Brady and parked where he could see her. Thomas pulled up to the informant in a green Bonneville. Officer Stanley observed a hand-to-hand transaction. He picked up the informant, and she gave him a piece of white tissue paper containing an "off white rocklike substance." (*Id.* at 103.)

Thomas was apprehended by Officer Scott O'Dell. As Officer O'Dell identified himself and approached the driver's side of Thomas' car, he saw Thomas trying to swallow a plastic bag containing a white substance. Officer O'Dell told Thomas not to swallow the bag. Thomas climbed toward the passenger side and managed to swallow the bag before he was handcuffed. He was taken to the emergency room, but he refused treatment.

Officer Brent Brown searched the Bonneville and found \$50 and an off-white substance he believed was cocaine. The serial numbers matched the money given to the informant.

Thomas was charged with two counts of dealing in cocaine as Class B felonies for sales on June 7 and 12 of 2006. Thomas was also charged with two counts of dealing in cocaine as Class A felonies. One alleged he sold cocaine on August 15, 2006 within 1000 feet of Elgin Manor Apartments. The other was based on alleged cocaine found in Thomas' car when he was arrested within 1000 feet of Parkview Apartments.⁴ Thomas was also charged with maintaining a common nuisance, a Class D felony. After a bench trial, the trial court found Thomas guilty of the two Class B felonies relating to June 7 and 12, the Class A felony based on the August 15 sale, and the Class D felony.

DISCUSSION AND DECISION

1. Sufficiency of the Evidence

⁴ The record states this charge was dismissed; however, it appears the trial court found the evidence insufficient. At the conclusion of the trial, the court stated, "I'm dismissing Count 5 because I don't think the evidence supports the information and requirements." (Tr. at 317.) No evidence concerning Parkview Apartments was elicited, and the State acknowledged the Indiana State Police Laboratory found no cocaine among the substance collected from Thomas' vehicle.

Thomas argues the evidence was insufficient to establish he sold cocaine on June 7 and to permit the enhancement of the August 15 sale to a Class A felony. In reviewing the sufficiency of the evidence, we do not reweigh the evidence or assess the credibility of the witnesses. *Love v. State*, 761 N.E.2d 806, 810 (Ind. 2002). We consider the evidence most favorable to the verdict and the reasonable inferences drawn therefrom. *Id.* We will affirm if there is probative evidence from which a reasonable trier-of-fact could have found the defendant guilty beyond a reasonable doubt. *Id.*

A. June 7, 2006

Thomas argues there was insufficient evidence he sold cocaine on June 7 because the confidential informant did not testify and the buy was not properly controlled. The informant had been fitted with an audio transmitter, but the recording was inadvertently erased. The officers intended to keep the informant in sight at all times, but she may have been briefly out of the officers' sight after the deal was completed. Officer Seth Stanley could not see the informant from where he was parked. Officer Jeff Stanley was able to observe the informant, but he was assigned to watch Thomas. Officer Jeff Stanley saw the informant begin walking south along Granville Avenue, but he did not see her walk all the way to Officer Seth Stanley's car.

We do not believe the informant's brief absence from the officers' sight is fatal. Evidence may be sufficient even if an informant is briefly out of sight during a properly controlled buy. *See Watson v. State*, 839 N.E.2d 1291, 1293 (Ind. Ct. App. 2005) (Describing a controlled buy, we stated, "Except for what actually transpires within the residence, the entire transaction takes place under the direct observation of the police.").

Before the transaction, the police thoroughly searched the informant, including her pockets, shoes, and bra. Thomas was alone in the Bonneville. Officer Jeff Stanley saw Thomas lean toward the informant “as if to give her something.” (Tr. at 186.) After the transaction, the informant had cocaine, but not the purchase money. This evidence is sufficient to sustain the conviction.

B. Class A Felony Enhancement

Thomas’ offense on August 15 was enhanced to a Class A felony because the sale was completed within 1000 feet of a family housing complex. Ind. Code § 35-48-4-1(b)(3)(B)(iii). A “family housing complex” is, among other things, “a building or series of buildings” containing subsidized housing or “operated as an apartment complex.” I.C. § 35-41-1-10.5. An “apartment complex” is “real property consisting of at least five (5) units that are regularly used to rent or otherwise furnish residential accommodations for periods of thirty (30) days or more.” I.C. § 6-1.1-20.6-1.

Damon Thomas, the property manager of Elgin Manor Apartments, identified the apartments on an aerial photograph and indicated they were near the intersection of Streeter and Brady. He testified there were 120 units that were rented for residential accommodations. The units are typically leased for a year at a time. Elgin Manor Apartments receives government subsidies.

Thomas argues the State did not establish Elgin Manor Apartments is a “family housing complex” because Damon did not testify those conditions existed as of August 15, 2006. Officer Seth Stanley testified the August 15 sale took place near Elgin Manor

Apartments. He identified Elgin Manor Apartments in a photograph and testified “children were actually playing just to the south of the complex.” (Tr. at 111.) Thomas’ own testimony establishes Elgin Manor Apartments contains residential housing:

Q. At any point in time, have you ever visited people or knew [sic] people that lived in Elgin Manor Apartments?

A. Yes, ever since they were put up twenty-some years ago. Yes, I’ve known people that lived there.

* * * * *

Q. And you visited them there?

A. Sometimes.

(*Id.* at 254.) The testimony of Damon, Officer Stanley, and Thomas would permit a reasonable trier-of-fact to conclude Elgin Manor Apartments is a family housing complex and was at the time of the sale. The evidence was sufficient for an enhancement to a Class A felony.

2. Motion for Continuance

Thomas also argues the trial court erred by denying his motion for a continuance based on the State’s late disclosure of two witnesses. “Rulings on non-statutory motions for continuance, such as the Defendant’s, lie within the discretion of the trial court and will be reversed only for an abuse of discretion and resultant prejudice.” *Maxey v. State*, 730 N.E.2d 158, 160 (Ind. 2000).

The drugs the confidential informant purchased were originally tested by Kristi Long, a chemist for the Indiana State Police Laboratory. Long was on maternity leave at the time of the trial and was not available to testify. Troy Ballard, also a chemist and

Long's supervisor, retested the drugs and testified at Thomas' trial. Thomas was notified on July 18, 2007, twelve days before trial, that Ballard would testify. Thomas expressed concern about the amount of the substance that was available for retesting, but Ballard testified it was possible to test even a cocaine residue. The weight of the cocaine was not an element of the offenses with which he was charged. Thomas acknowledged he never attempted to speak with or depose Long, (Tr. at 171), and he concedes he cannot demonstrate he was prejudiced. (Appellant's Br. at 16.)

Thomas also was not notified until July 26, 2006, four days before the trial, that Damon would testify. Thomas was given an opportunity to speak to Damon before he testified. Thomas presented witnesses of his own, who testified Elgin Manor is not under the jurisdiction of the Delaware County Housing Authority or part of the Muncie Housing Authority. Again, Thomas concedes he was not prejudiced. (*Id.*) In light of these concessions, we cannot say the trial court abused its discretion by denying Thomas' motion for continuance, which was made the day of the trial.

Affirmed.

RILEY, J., and KIRSCH, J., concur.